SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 845

GERHART EISLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Gerhart Eisler prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the District of Columbia Circuit, rendered April 18, 1949, petition for rehearing denied on May 6, 1949, which decision affirmed a judgment of the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia) convicting petitioner of violating Title 22, Section 223(c), U. S. Code.

Opinions Below

The opinion of the Court of Appeals has not yet been reported. The majority and dissenting opinions appear in the Record at 785-790. The District Court filed two memorandum opinions in connection with the case. One (R. 13-22), filed in connection with rulings on petitioner's

motion to dismiss the indictment, is reported in 75 F. Supp. 634. The other (R. 47-58), filed in connection with rulings on petitioner's motions in arrest of judgment, for a new trial, and for judgment notwithstanding the verdict, is reported in 75 F. Supp. 640.

Summary Statement of Matter Involved

(a) *Events before trial*

In 1940, Gerhart Eisler, a German Communist, was a prisoner of the Vichy French government in a concentration camp for "special political" prisoners. The inmates of this camp were in danger of being delivered by the Vichy government to the German Gestapo (R. 585, 598).

At that time, Eisler and a number of other prisoners in the concentration camp were invited by President Cardenas of Mexico to accept sanctuary in that country. The Mexican government also prevailed on the Vichy government to permit those so invited to leave. Eisler thereupon received a Mexican immigration visa. Since the only available route from France to Mexico was via the United States, Eisler also applied for, and received from the American consul at Marseilles, a transit visa authorizing him to pass through American territory in transit to Mexico (R. 585, 586, 534).

On June 13, 1941, Eisler reached the United States. Although he held only an American transit visa and informed the American authorities that he wished to take the next ship for Mexico, which was leaving in a few days, he received a hearing on Ellis Island from a board of special inquiry of the Immigration and Naturalization Service. This board found that Eisler had no papers permitting his entrance into the United States as an immigrant and that he was not able to establish a status which would allow him to enter the country on another basis. It therefore ordered that he be deported. Eisler was asked if he wished

to appeal the order, and he declined to appeal. The board advised Eisler that he did have the transit privilege and that "the facilities of the service would be made available to allow him to depart on the first available steamship." In the meantime, Eisler was required to remain on the ship which had brought him to port or on Ellis Island (R. 534, 641, 642).

A week later, while still awaiting his sailing to Mexico, Eisler was informed that the United States government would not permit him to leave. He was given no reason for this decision. He then remained on Ellis Island for about seven weeks as one who was neither allowed to enter the United States nor to leave it. On August 8, 1941, the government permitted him to leave Ellis Island as an "alien in transit" whose time of departure was stayed, but only on his posting $500 bond that at the end of the stay he would leave the country. Thereafter, however, the government never permitted Eisler to depart; instead, it continued the stay from time to time. At a later date, the immigration authorities, without application by Eisler, changed his status from an "alien in transit" to a "visitor for pleasure" (R. 534, 535, 642).

Early in 1942, Eisler filed a formal application with the United States Department of State requesting permission to leave the country to go to Mexico. On March 27, 1942, the State Department informed Eisler that "an exit permit may not be granted to you under the authority contained in the President's Proclamation of November 14, 1941, and the regulations issued thereunder." No reasons were stated (R. 522, 523, 544-546).

On September 5, 1945, Eisler filled out in New York City an application for permission to depart from the United States on State Department Form AD-1. He signed the form and had it notarized in New York City. On the form

he expressed an intention to go to Berlin, Germany, stating as his reason: "I want to return to Germany in order to participate in the building of a new German Democracy in whatever capacity I might be useful there" (R. 139, 243-244, 558-559, 572, 777-779).

Eisler then gave the executed application to the person who had signed as a witness to the application, and either she or someone else, acting on Eisler's behalf, deposited the application in the mails, addressed to the Secretary of State, Washington, D. C. (R. 572). The application was received in the appropriate processing unit of the Visa Division of the State Department in Washington on September 7, 1945 (R. 139, 559).

On October 5, 1945, the Visa Division directed the placing of a "general stop order" against Eisler's possible departure. The direction stated that it was made "inasmuch as Eisler claims Austrian nationality" (R. 529-530, 531, 542, 782). However, the official who had placed the stop order testified that on October 5, 1945 the exit regulations had been relaxed so that an Austrian could leave the United States and that the real reason for the stop order was that he had information from the FBI and other sources to the effect that Eisler was affiliated with the Communist Party (R. 542-544). It was such information which had also caused the refusal to allow Eisler to leave for Mexico in 1941 and the denial of his 1942 application for permission to go to Mexico (R. 522, 523, 530, 531, 533, 541, 587, 588, 717, 718).

Despite the stop order, the State Department at that time sent no word to Eisler regarding his application. In June 1946, the Soviet consulate agreed that it would grant to Eisler and to other members of his German refugee group a transit visa to Odessa, Russia, for passage therefrom to the Soviet zone of Germany (R. 574). On July 9,

1946, Eisler, who had still received no word from the State Department regarding his application, wrote to that Department in Washington as follows:

> Having just received a visa to travel to the USSR on a Russian boat, I herewith ask you respectfully to grant me and my wife, Brunhilda Eisler, nee Rothstein, an exit permit (R. 575, 780).

This letter was received in the Visa Division on July 13, 1946 (R. 780, 563).

On July 19, 1946, Eisler was interviewed by two FBI agents who questioned him regarding his activities as an alleged Comintern agent (R. 358, 379, 380, 706). The agents told him that they knew he had applied for an exit permit and was seeking to go to the Soviet zone of Germany via Russia (R. 707).

On July 31, 1946, Ira P. Meyer, the Visa Division official primarily responsible for the granting of exit permits, checked with the FBI and other divisions of the State Department. They all informed him that they had no objections to the departure of the Eislers, and Meyer thereupon noted on Eisler's letter: "Approved for Mr. and Mrs. Eisler" (R. 139, 780, 538-541). Meyer testified that by this approval he, on behalf of the State Department, found that it was in the "interests of the United States" to permit Eisler to depart and that he had waived all other formal requirements for obtaining permission to depart (R. 539, 547).

Also on July 31, 1946, the Visa Division sent to Eisler a form postcard bearing the same number as his application for an alien departure permit, and reading as follows:

> You are hereby informed that the Department has passed upon your application for permission to depart from the United States. It will be necessary to fur-

nish the Department with the date and port of your departure, so that the departure control officer may be notified of your intention (R. 535, 536, 783).

On October 10, 1946, Eisler wrote the Visa Division pursuant to this postcard notification, that he and his wife were sailing on or about October 14, 1946, by a named ship, giving the port of departure. Eisler asked in this letter that the Visa Division inform the departure control officer that the Eislers were leaving (R. 553, 554, 784). Meyer, of the Visa Division, informed the FBI of the contents of this letter, and on October 11, 1946 informed the Departure Control Officer at the port of departure that the Eislers should be allowed to depart (R. 554, 784).

Shortly thereafter the State Department cancelled the Eislers' exit permit, without notifying them of its action. The Eislers first learned of this cancellation on October 16 (the sailing of their boat had been postponed to October 18), when Mrs. Eisler telephoned the port authorities in New York to check on whether everything was in order. Eisler never was given any reason for this cancellation (R. 582, 583). No explanation was offered at the trial by the State Department official who testified, and the record does not indicate the reason for the revocation (R. 54).

On April 14, 1947, Eisler was indicted in the District of Columbia for violating 22 U. S. Code sec. 223 on the charge that he did "within the District of Columbia, knowingly make false statements in an application for permission to depart from the United States, with intent to induce and secure the granting of such permission for himself"[1] (R. 1, 3, 4). The indictment alleged that Eisler had

[1] The indictment contained three counts, of which the above recites the third, the first two alleging violations of 18 U. S. Code, Sec. 80 and resting on the same alleged false statements as were referred to in the third count. The first two counts were dismissed prior to trial on motion of the defense (J. A. 6, 18). *United States* v. *Eisler*, 75 F. Supp. 634.

answered certain questions falsely, as follows, in the application for permission to depart which he had filled out in New York City on September 5, 1945:

(A) the defendant answered the following question:

'23. State the names of all organizations, groups, societies, clubs, or associations of which you are or have been a member, or with which you are or have been affiliated,' by writing 'None', whereas in fact the defendant had been and was then a member of and was affiliated with the Communist Party, as he, the defendant, then and there well knew;

(B) the defendant answered the following question:

'18. State what names you have used, or have been known by, before and after you arrived in the United States', by writing only the words 'Gerhart Eisler', whereas in fact the defendant had used and had been known by the names 'Gerhart' (or otherwise similarly spelled), 'Edwards', 'Brown', 'Samuel Liptzen', 'Hans Berger' and 'Julius Eisman' (or 'Eiseman'), as he the defendant, then and there knew;

(C) the defendant answered the following question:

'7. Where have you resided, what has been your occupation, and who have been your employers, if any, during the past 10 years?' by stating as places of residence only 'Austria, France, Spain, since 1941 USA', whereas in fact the defendant resided in the United States in the years 1935 and 1936 for periods of time which were 'during the past 10 years' within the meaning of said question, as he, the defendant, then and there well knew; (R. 1, 2).

The indictment thus was grounded on Eisler's alleged failure to reveal certain facts called for by the questions rather than on affirmative misstatements of fact. It is clear

from the record that the omitted information, as well as much more information regarding Eisler, was known to the Visa Division of the State Department and to the FBI, with whom that Division cleared Eisler's application, before July 31, 1946, when the Visa Division had approved the application, and for that matter long before Eisler ever filed the application (R. 522, 523, 530, 531, 533, 541, 587, 588, 717, 718). As stated by the trial judge in one of his memorandum opinions (R. 47, 54, *United States* v. *Eisler*, 75 F. Supp. 640, 645):

> There can hardly be any doubt that when the notice [Defendant's Exhibit 62, R. 783] was sent to the defendant, which was tantamount to an approval of the application, the Department of State had substantially all, if not all, of the critical information which the defendant is charged with having concealed.

Prior to trial, the trial court denied defense motions to dismiss the third count of the indictment for lack of venue and failure to state facts sufficient to constitute an offense. The trial court also denied a defense motion to transfer the proceedings to another district (see Rule 21, Federal Rules of Criminal Procedure) (R. 13-21). The trial court also denied a defense motion to disqualify, as a matter of course, all government employees as jurors (R. 74, 75, 83). As a consequence, after the exhaustion of the defense challenges, three of the jurors were employees of the federal government and one was an employee of the District government (R. 77, 83, 85). A defense motion for a bill of particulars was granted in part and denied in part (R. 5, 21, 68-72). Among the particulars supplied was the statement that "the Government will prove that the defendant was a member of the Communist Party in Germany from about 1918 to about 1945; that he was at various times from about 1918 to about 1945, affiliated in those countries, and

also in Moscow, Russia, with the Communist Party organizations of the countries of Germany, Austria, Russia, China and the United States; and that he was affiliated with the Communist Party in the United States from about 1928 to about 1945" (R. 11). Among the particulars refused was a statement of the actions by which petitioner became affiliated with the Communist Party and of the nature of that affiliation (*Cf.* R. 5 with R. 11; R. 21).

(b) *The trial*

Under the indictment, the corpus delicti which the prosecution had to prove was the truth of the information which Eisler allegedly had not recorded on the application for an exit permit; i.e., Eisler's membership in the Communist Party, his use of and his having been known by the names "Gerhart," "Edwards," "Brown," "Samuel Liptzen," "Hans Berger," and "Julius Eisman," and his having been in the United States in 1935 and 1936. Once these facts were proven to the satisfaction of the jury, there was left for jury determination issues capable of resolution only by inference and not by direct factual testimony—namely, whether the information had been omitted (a) "knowingly" and (b) "with intent to induce and secure the granting" of permission to depart.

The prosecution's task of proving the corpus delicti was simple. At the trial the defense did not dispute, but freely conceded, the existence of virtually all the facts which the indictment charged Eisler with having concealed,[2]

[2] Thus Eisler testified: he had been a member of the Austrian Communist Party (R. 597, 598) and then a member of the German Communist Party (R. 598); he had been in the United States between 1934 and 1936 (R. 617, 670), he had used the names "Samuel Liptzen" (R. 617, 618, 662, 664, 672) and "Edwards" (R. 618); he had received and endorsed checks drawn to "Julius Eisman" (R. 653-658, 661, 662). Other defense witnesses also testified on various of these subjects—e.g., Eisler's membership in the German and Communist Parties (R. 611, 612); Eisler's connection with the name Eisman (R. 612-615).

and stipulated Eisler's execution of the application for permission to depart (R. 243, 244). What is more, the prosecution did not have to rely on any anticipation of such docility by the defense at the trial. The corpus delicti was readily provable by statements which had been made by Eisler to government representatives prior to the indictment and which had been recorded or noted.[3]

In addition, the prosecution had and used independent testimony which confirmed Eisler's admissions regarding the omitted information described above.

The defense, beside raising various questions of law, did offer several issues for resolution by the jury which bore on the questions of knowledge and intent. A few illustrations will suffice. Thus Eisler testified that he had interpreted the question on the application form as to membership in organizations as relating only to organizations in the United States (R. 634). Again, he testified that certain of the omissions were made solely to protect other persons from punishment or exposure and not with the intent to secure a permit to depart; that on the contrary Eisler believed that such omissions might jeopardize his obtaining the permission (R. 618, 619, 615, 616, 771).

The case, however, was not presented to the jury on the relatively narrow issues of the indictment—whether Eisler

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[3] At a stenographically transcribed hearing of the Immigration and Naturalization Service, held on March 31, 1947, Eisler had testified, among other things: that he had been a member of the German Communist Party and of its district and central committees (R. 387); that he had been in the United States in 1935 and 1936 (R. 403, 397, 398, 417, 418); that he had used the name "Gerhart" as a party name in Germany and Moscow (R. 390, 397) and in writing for a German communist publication (R. 391); that he had used the names "Edwards" (R. 397) and "Brown" (R. 398); that he had obtained a passport under the name of "Samuel Liptzen" (R. 399, 403); that he had collaborated on articles published under the name "Hans Berger" (R. 409); that he had endorsed the "Eisman" checks (R. 407-409, 414). On July 19, 1946, Eisler had told two FBI agents, who interviewed him and took notes, of his membership in the German Communist Party (R. 359, 361, 380).

had knowingly made false statements with the requisite intent—an issue which, as we have seen, could have been fully tried on readily available and virtually uncontested facts. Instead, the prosecution, relegating the real issues to the background, undertook to prove to the jury that the petitioner was a dangerous agent of the Communist International who had operated as such in numerous countries and whose mission in the United States country was to foment revolution and sabotage. This presentation involved an appraisal of the petitioner's life and career and of the organization and functions of the Comintern.

The first documentation of the foregoing is contained in the prosecution's opening statement to the jury. This opening statement contained the following:

> (1) In the first World War Eisler 'was a member of the Infantry of the Austrian Army, fighting the allies.' (R. 91).
>
> (2) About 1920, 'he commenced to write for an underground illegal newspaper in Germany, which had as its translated name, "The Red Flag." (R. 92).
>
> (3) 'In 1928, after a number of years of activity in the Communist Party of Germany, he became engaged in a controversy with some other members of the Party and as a result of which certain charges were made against him, and the powers that be in the Communist Party saw fit to call him on the mat to Moscow, Russia.' (R. 92).
>
> (4) 'Eisler was sent to China, where he was a propagandist, where he was an underground observer and where, in fact, he was a spy, sending information, as well as articles for publication, back to Moscow, Russia.' (R. 94-95).
>
> (5) Eisler 'was lecturing in Germany at the Communist Workers School, in 1931.' (R. 96).

(6) Eisler 'became a member of the Comintern, so-called in Moscow in 1931.' (R. 96). 'He was a Comintern representative from Germany.' (R. 99).

(7) 'The Communist Party was operated in those days, and perhaps now, from Moscow, Russia. We will show you that the principal and governing body of the Communist Party was known as the Communist International. It was the Communist Party in a grouping of its national segments throughout the world.

'The Comintern was made up of representatives, called Comintern reps, in short, from the various countries where the Communist Party was active.

'And in the same organization, when the Comintern itself was not in full session, there were two bureaus or two organizations, made up of people who were in the Communist International; and the first one was known as the Executive Committee, which sat at times when the entire Comintern was not there and couldn't sit; and there was also an organization of the Comintern, a sub-committee, you might say, so to speak, with tremendous authority, in the Communist international.' (R. 96-97).

(8) 'In other words, the United States might have a representative to the ruling body of the Communist Party, to the Comintern, that is, and he may be an American citizen. He would be a member in the American Communist Party, and he would have membership in the Comintern. On the other hand the Comintern might in turn, have a representative from it, from Moscow, Russia, to the United States, which is somewhat the opposite of what I have just mentioned, except that that person need not be a citizen of the United States; he need not be from Moscow, Russia. He might, as was the instance of Gerhart Eisler himself, be a German Communist Party member. And, as a member of the Comintern, he was a Comintern representative to the United States.' (R. 99-100).

(9) 'And in order to show you the importance of Gerhart Eisler even back at that time [in 1931 and 1932], in the Communist Party, he, as a German Communist Party member, was a member of the Anglo-American Commission [in Moscow]. He, performing the function of one of the Commissioners, was one of the persons who formulated the policies of the institute, which in turn determined what was to be taught at the institute and how the students from various countries could be instructed.' (R. 100).

(10) 'These courses were . . . courses in trade union strategy, courses in military science, taught by officers of the Soviet Union Army; courses in partisan fighting; courses in the science of civil war; courses in the use of weapons prevalent in the various countries; courses in the assembling of weapons; and in short, they were termed as professional revolutionists' (R. 102).

(11) 'We will show you that Eisler arrived in this country in 1933, and that he arrived here under a false French passport. . . . He immediately got in contact with the Communist Party Headquarters . . . in New York City, where he conferred a number of times with the leader of the Communist Party, Earl Browder' (R. 103).[4]

(12) 'The two of them [Eisler and Browder] collaborated on what they felt were the aims of the American Communist Party, as Edwards [Eisler] saw fit to bring them up to date from Moscow.

'We will show you that Edwards, during the summer of 1933, went to some of the principal industrial centers of the United States, and that in particular in the summer of 1933 he went to Cleveland, Ohio, where he contacted the local communist leader, who was known, I believe, as the district leader.

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[4] Eisler's 1933 trip to the United States was a different trip than the 1935-1936 visit which was the basis for the allegation in the indictment that Eisler had resided in this country in the latter two years.

'In any event, he contacted one of the principal leaders there in Cleveland, and this leader at the time was interested in infiltrating himself and other communists into the industrial unions, in the automobile, the small parts, and the rubber industries. Eisler told this man he should bring his activities, and those of the workers he could control in those industries, more directly under the line of the Moscow Party, as they had determined it previously.

'We will show you that the leader in Cleveland objected to any course further to the left than he had already taken. He stated that the time was not yet ripe' (R. 104).

(13) 'We will show you in 1934 Eisler travelled with Earl Browder to San Francisco, California, and that that was at the time of the very famous waterfront strike, which completely crippled shipping on the Pacific Coast. It halted the transportation of food, and even disrupted the transportation of the mails.

'We will show you at that particular time, on that particular trip, that Eisler attended a large mass meeting of communists held at Fresno, California' (R. 111).

(14) Eisler's 'purpose was to be in this country and not only to closely affiliate himself with the activities of the American Communist Party, but to see that they were brought into and kept in line with the policies adopted by him and other members of the Communist Party of other countries in Moscow, Russia, for the operation of the Communist Party in this country' (R. 112).

(15) Eisler 'was a representative of the Comintern and was coming to the United States and was going to show the stupid Americans how to run the Communist Party in that country' (R. 114).

(16) Eisler's 'real purpose for coming to this country . . . was the purpose of disrupting the economy

of the United States, to further the ends of Moscow' (R. 114).[5]

(17) 'We will show you that after returning to Europe in 1936 he [Eisler] went to Spain, where he engaged in the war against Franco . . . that was largely a war between Franco and certain forces that were recruited in Soviet Russia. . . .' (R. 130-131).

(18) '. . . in 1939, in August, before Hitler's war started in Europe by about one month, the French arrested and interned him as a German alien' (R. 133).

The prosecution's opening statement was, of course, followed by testimony relating (frequently tenuously) to the above matters, with certain exceptions—the prosecution never offered evidence that Eisler used a false French passport in 1933 or that he had been a spy in China. Indeed, it is clear that if evidence had not been offered in support of the opening statement a mistrial would have been required on the basis that the prosecution had made inflammatory statements which it later failed to support by proof. Since the evidence so offered was irrelevant and inflammatory, a mistrial was nevertheless required.

It is not feasible to recount all the testimony which the prosecution introduced in support of its theory of the case— i.e., that Eisler was on trial for being a Comintern agent in the United States and other countries. We will only briefly summarize some of this testimony, as follows:

In 1926, Eisler worked for the Russian Embassy in Germany, giving the Russian Embassy information about Germany (R. 145, 146). Eisler was a member of the Comintern, being a German representative thereon (R. 151, 276, 282-283). Eisler was a representative from the Comin-

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[5] When defense counsel objected to this remark (as they had objected to all the others, the trial judge directed the jury to ignore one portion of the remark—"to further the ends of Moscow"! (R. 127, 128).

tern to the American Communist Party. Eisler was head of the Comintern (R. 165). He went to China for the Comintern (R. 152-153). Testimony was given as to the nature and structure of the Comintern (R. 149-151, 173-179). In 1928, Eisler was summoned to Moscow "for a special party's screening and purging" (R. 151-152). Eisler advocated in Moscow that Negroes should control the government in the cotton and tobacco belt of the United States and had the right to separate from the United States (R. 160-162, 185). Eisler came to the United States in 1933 in order to change the policy of the American Communist Party and to run that party because the American Communists were "behaving like idiots" (R. 705). The Communist Party smuggled important documents across the Canadian border (R. 196, 197). At a secret meeting near that border at which Eisler and representatives of the American and Canadian Communist Parties were present, those at the meeting hastily tossed documents in a stove when police visited the premises. At another meeting, Eisler advocated the development of work of the Communist Party within AFL unions and the organization of basic industries, contending "that it was essential for the party to sink its roots in the basic industries as a necessary prerequisite for the seizure of power in the United States" (R. 210). At still another meeting in the United States, Eisler advocated intensification of Communist Party work to organize the Negroes in the South, unifying the "black belt" and establishing a Negro government in that area. He also stated that the winning over of the Negro people as an ally of the white workers was essential to the successful overthrow of the United States government (R. 211). Eisler advocated recruitment of Communist Party members among young people in CCC camps and among veterans (R. 283-285). He was imprisoned in France as a spy (R. 368).

In his summation to the jury at the close of the trial, the prosecutor argued over objection that Eisler had "made plans and had arranged to come to this country to carry on the activities he had started in the Lenin school in Moscow" (R. 757), although there is no evidence in the record to support this statement. At least three times in the summation the prosecutor stressed his view that he had proved that Eisler came to the United States in 1933 as a Comintern agent and that Eisler's denials of such a role were not credible (R. 761, 762). In the following passage in the summation the prosecutor, openly playing on the prevalent prejudices against Communists, indicated the thesis of his presentation—that Eisler should be convicted because he was an important Communist (emphasis added):

> It is true he [Eisler] was anti-Hitler. It is also just as true he was anti the three governmental administrations that preceded Hitler in Germany.
>
> When he went to China he went to a China where he was anti the Chinese Government there.
>
> And when he went to Spain he was anti Spanish government there.[6]
>
> And we say when he came to this country he was anti Government in this country.
>
> I think it may well be that we should refer to him in that way as anti-Government. *Occasionally I get some amusement when this case is over in the late afternoon just to wonder what Mr. Eisler was doing at a time when Stalin and Hitler were scratching each other's backs in 1939, 1940 and part of 1941.* I wonder who he was anti, then. I wonder which one of these underground holes he crawled into at that time (R. 760).

So far as the defense was concerned, the inflammatory nature of this presentation of the case was aggravated by an

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[6] This statement required the remarkable assumption by the prosecutor that during the Spanish civil war the "Spanish government" was not the Loyalist government but the Franco rebels.

inability to defend against issues which were so unlimited and of which notice had not been given. Neither the indictment nor the bill of particulars afforded notice that the principal issues to be tried were Eisler's alleged role as a Comintern agent in various countries, his alleged efforts to wreck the American economy and foment a revolution, his life and activities generally for over thirty years in seven different countries, the structure and function of the Comintern, and the views of Eisler and other Communists on Negroes, revolution, trade unions, etc.

Although the trial court allowed the introduction of large quantities of evidence on these subjects and although it recognized that the defense had not received notice that the prosecution would seek to prove that Eisler was a Comintern agent (R. 271, 272), nevertheless, it refused to strike evidence concerning the Communist International and that Eisler was a Comintern agent, on the ground that this evidence did not go to the "critical issue" (R. 520, 521). Subsequently, the trial court denied defense motions to take the depositions of witnesses who were abroad and whose testimony was necessary to refute this evidence (R. 390-592).[7]

The jury returned a verdict of guilty (R. 775, 776), and Eisler was sentenced to imprisonment for one to three years, the sentence to commence at the expiration of the sentence

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[7] The testimony sought to be obtained would, under the defense offer of proof, have contradicted prosecution testimony that Eisler was "affiliated" with a (non-existent—R. 600-603) world-wide Communist Party; that he was a member of the Communist International; that he was a member of a sinister Anglo-American Commission in Moscow; and that he was a Comintern agent in China (R. 590-592). The defense position was that if the prosecution evidence on these subjects was irrelevant, it should be excluded or stricken; if it was relevant, the defense must be allowed an opportunity to refute it when surprised by its introduction. The court, however, allowed the prosecution evidence, refused to strike it, and, although conceding the surprise, refused to allow the defense to meet the evidence by obtaining the depositions requested.

in Eisler's conviction for contempt of the House Committee on Un-American Activities (R. 66).

(c) *After trial.*

On appeal, the judgment of conviction was affirmed with Judge Edgerton dissenting. Judge Edgerton dissented on the grounds that there was no territorial jurisdiction in the District of Columbia and that government employees should have been excluded from the jury. The dissent did not consider the other issues raised on appeal.

The following facts do not appear of record in this case, but we believe that the government will concede their accuracy and that the Court may appropriately notice them.

(1) Following the trial, and while Eisler was under appeal bond in both this and his former conviction, the Attorney General arrested Eisler and held him without bail *allegedly pending action to deport him.* The District Court for the Southern District of New York refused Eisler a writ of habeas corpus on the grounds that the Attorney General's discretion as to bail of aliens held for deportation was not reviewable,[8] but allowed bail

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[8] Eisler, of course, would have been only too happy to be deported or to be allowed to leave voluntarily. What he objected to was being imprisoned pending "deportation proceedings" which were not scheduled and under circumstances in which it was clear that he would not be allowed to leave the country even if he were ordered deported. That the real purpose of his arrest for "deportation" was to prevent Eisler from making speeches by imprisoning him, see our brief in this Court in the first *Eisler* case, pages 101, 102, footnote 14, quoting testimony of the Attorney General before a subcommittee of the Committee on Un-American Activities. The Court will recall from the record in the first *Eisler* case that this was the second time Eisler had been arrested by the Department of Justice. On the earlier occasion, when he was arrested, without warrant, as an "enemy alien," the Department hurriedly released him when a District Court denial of habeas corpus came up for argument before the Second Circuit Court of Appeals,

pending appeal. This decision was reversed by the Court of Appeals for the Second Circuit which remanded the case in order that the District Court might review the Attorney General's denial of administrative bail. By agreement between the government and Eisler's counsel, the case was not called up again in the District Court, and Eisler remained at large, technically on bail pending the appeal to the Circuit Court of Appeals (which appeal, of course, had been determined).

(2) On May 6, 1949, Eisler escaped from the United States on board a Polish ship bound for Gdynia, Poland via Southampton, England. On the instance of the United States, he was forcibly removed from the ship by British authorities in British waters over the protest of Polish authorities. Thereafter, the Bow St. Court refused to extradite Eisler and ordered his release. Eisler then left England and proceeded to the eastern sector of Germany.

Statement as to Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254. The judgment of the Court of Appeals for the District of Columbia Circuit was entered April 18, 1949, and a petition for rehearing was denied on May 6, 1949.

Statute and Regulations Involved

In the Appendix to this petition there are set out 22 U. S. C. Sec. 223 and the regulations which were in effect at the relevant time regarding the issuance to aliens of permits to depart from the United States.

Questions Presented

1. Did the District Court of the District of Columbia lack territorial jurisdiction, and does petitioner's conviction

in the District of Columbia violate the Sixth Amendment and Article III, sec. 2, clause 3 of the Constitution?

2. Was it error for the trial Court to refuse to exclude from the jury all government employees?

3. Did the petitioner receive an unfair trial in violation of the due process clause of the Fifth Amendment and of the Sixth Amendment?

4. Was the indictment and the application form on which it was bottomed unconstitutionally vague?

5. Was the trial Court in errer in denying the motion for judgment of acquittal in view of the circumstance that under the applicable regulations appellant was not required to obtain permission to depart from the United States and that the information he is alleged to have concealed was known to the State Department and was irrelevant to any decision by it as to whether he should be allowed to depart?

Reasons for Granting the Writ

The orthodox reasons for granting the writ are present in this case. That is, the case involves important questions of Federal law which have not been, but should be, settled by this Court. The decision below is, also, inconsistent with applicable decisions of this Court. Finally, the decision below sanctioned such a departure by the trial Court as to call for an exercise of this Court's power of supervision. But overshadowing all of these important legal issues is the circumstance that the case cries for review in order that a perversion of American justice may be corrected in the eyes of the world and that some early halt may be put to the increasing abuses of fundamental civil liberties by Federal authority. The basic issue in this case is whether Communists, aliens or citizens, suspected

or actual, are to be accorded fair treatment and due process of law and whether they may be persecuted for their beliefs under any handy pretext.

1. *The Case as a Whole*

It must be apparent to all from the records in both *Eisler* cases that the real conflict between Eisler and the government is not whether he committed the crimes charged—in one case, contempt of Congress, in the other, an attempt to mislead the State Department by concealing from it relevant information which it already had. On Eisler's side the desire was that he return to his home and work from a country which he had not even wanted to enter. On the other hand, the Attorney General desired to propitiate the Committee on Un-American Activities and the hysteria against Communists—with Eisler as a victim. Both prosecutions arose only because the Committee on Un-American Activities created scare publicity by inventing a legend about Gerhart Eisler, and the Attorney General felt it necessary to react.

On February 18, 1947, the Committee on Un-American Activities offered to the House of Representatives a resolution to cite Eisler for contempt of Congress. Representative Nixon, who spoke first on the resolution on behalf of the committee, stated the real purpose of the resolution. He said:

> The resolution before the House today proposes a very simple and direct question. By adopting the report of our committee concerning an obvious contempt, this House can put Mr. Eisler out of circulation for a sufficient period of time for the Department of Justice to proceed against him on more serious charges. [93 Cong. Rec. 1130]

Subsequently, Representative Mundt, a member of the Committee, stated:

> . . . we expect the Department of Justice not only to act expeditiously from the standpoint of trying this man for contempt of Congress, but also to make certain that he does not leave the country until that trial takes place. We also expect the Department of Justice to move forward with equal expedition on the five other charges that were made against Mr. Eisler, which indicate his great hazard to this country. [93 Cong. Rec. 1135]

And Mr. Mundt added:

> That is one reason we feel that after we cite, as we are going to do today, this Gerhart Eisler for contempt of Congress, probably he will be here at least a year while the Attorney General's Department gets ready to act. So in all events, that will keep him in America and prevent his carrying information back to his bosses in Moscow. However, we sincerely hope the Attorney General's office will really go to work and get action on this Eisler case. [93 Cong. Rec. 1136]

But the Attorney General's office could not, in Mr. Mundt's words, "go to work and get action" on the charges made against Eisler that he was an atom-bomb spy, a saboteur, the foreign director of a conspiracy to overthrow our government by violent means. These nonsensical allegations were not capable of proof. Nevertheless, "action on this Eisler case" was still required. Accordingly, Eisler was indicted for giving false answers to vague questions, and this though the irrelevancy of the answers was proven by the circumstance that the State Department, being fully familiar with the "correct" answers and having cleared with the FBI, granted the permission applied for.

The venue for the action was artificially selected. Venue clearly existed in New York City, where all the petitioner's

actions had taken place and where were located the residences of the petitioner and many of the witnesses. But the District of Columbia, where the red scare is most acute and where government employees serve on juries, possessed obvious advantages for the prosecution of a Communist.

The confusion of the Assistant United States Attorney who prosecuted the case now becomes understandable. It is true that he prosecuted not the charges in the indictment but some other charges. On the other hand, it was the existence of these other charges which was the real ground for the prosecution, and the stated charges were, as the Assistant United States Attorney realized, consciously or unconsciously, only the ostensible grounds.

The Eisler indictment thus is part of a present-day pattern, in which prosecutions having political motivation are instituted on collateral charges. Thus Hiss and Bridges have been indicted, and Christoffel convicted, for perjury, and Marzani has been convicted of making false statements. The Department of Justice claims that it does not prosecute anyone for being, or because he is, a Communist. But it institutes one prosecution after another of persons who refuse to say whether they are Communists or who deny (allegedly falsely) being Communists; and grand juries in Denver and Los Angeles make sure that there is no dearth of subjects by summoning large numbers of witnesses to be asked the question.

We think that it is important for this Court to demonstrate that American justice does afford relief from such unseemly use of the federal courts. It is important that the integrity of our democratic processes be vindicated in an internationally famous case.

The same reasons call for the granting of review even though the petitioner has fled the jurisdiction. The cause is not moot; at any time in the future American authorities

may gain power over the body of the petitioner, either through extradition or otherwise, and they will then execute the sentence. If it is moot, then, under ordinary procedure, the judgment below should be reversed. There is no defect in this Court's jurisdiction, which is to review the decision below and address its mandate to the court below. Jurisdiction over the person attaches merely by the appearance of a defendant, personally or by counsel, at the initiation of a case. In criminal trials, the defendant must personally appear and be present throughout the trial. But this rule has never required that the defendant be in court or in the jurisdiction during appellate proceedings. Indeed, the Attorney General and the Solicitor General have never suggested that the cause is moot or that jurisdiction is lacking, but have addressed themselves only to the Court's discretion.

In the exercise of this discretion, the Court is aware that although it acts only in individual controversies its decisions have a vast public function in the operations of our democracy which transcends the particular case. This function can and should be exercised here, and the Court should review the important legal issues presented by this petition.

2. *The Issue of Jurisdiction.*

Petitioner was indicted and convicted for making knowingly and with a particular intent false statements in an application for permission to depart from the United States. The record is clear and undisputed that all physical conduct of the petitioner in connection with the application took place only in, and was completed in, New York City. He executed the application in New York, and it was then mailed for him in New York. The only nexus with the District of Columbia was the address on the envelope and its delivery in Washington by the postal authorities.

The holding below that jurisdiction existed in the District of Columbia obviously is of great sweep and importance. Its logic would allow prosecution in the District of Columbia whenever a false statement is made on the innumerable documents filed with federal agencies in the District regardless of the place of execution.

Aside from the manifest importance of such a holding, the decision below runs counter to the constitutional command, embodied in the Sixth Amendment and in Article III, section 2, clause 3, for trial in the vicinage. As the dissent below pointed out, the decision below is, also, inconsistent with *United States* v. *Johnson*, 323 U. S. 273, which held that the offense of use of the mails for a prohibited purpose could be prosecuted only where the material had been deposited in the mails and not where it was ultimately delivered. In that case, Justice Frankfurter, speaking for the Court, described the concern of the framers of the Constitution with limiting jurisdiction to the vicinage and the weighty public policies involved. The opinion points out (at 275) that leeway in choice of jurisdiction "not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." This rule is laid down (at 276): "If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

The present case is almost a model illustration of the need to apply the policies enunciated in the *Johnson* case. The petitioner was required to stand trial for five weeks away from home. The bulk of the transactions and events

testified to at the trial occurred in New York City. Virtually none occurred in the District of Columbia. Almost all of the defense witnesses resided in New York City. Only two of the witnesses for both defense and prosecution resided in the District. These circumstances not only indicate the hardship caused the defense by the government's selection of venue, but also give fair rise to the inference that the District of Columbia was chosen for trial because it was "deemed a tribunal favorable to the prosecution."

The decision below is also inconsistent with the recent Second Circuit case of *United States ex rel. Starr* v. *Mulligan*, 59 F. (2d) 200. This case tested on habeas corpus the attempted removal to Washington, D. C. from New York of one who had allegedly submitted to the Civil Service Commission in Washington a false affidavit executed in New York. The Court released the accused from custody under the removal warrant, holding that the perjury, which, of course, is the making of material false statements under oath, was committed and triable only in New York, where the application had been executed, and not in the District of Columbia, where the application had been filed.

3. *The Jury Issue*

In *Frazier* v. *United States*, 335 U. S. 497, this Court considered it to be a serious question whether government employees could lawfully sit as jurors in a federal prosecution for violation of the narcotics laws. Indeed, four members of the Court were of the opinion that they could not. It is clearly an even more serious question whether government employees may serve as jurors in a case where the defendant is a Communist and the prosecution seeks to prove that he is a Comintern agent. As the dissent below pointed out: "But government employment is not commonly known to be endangered by sympathetic association

with thieves or drug peddlers. It is commonly known to be endangered by sympathetic association with Communists."

But the vice of government employees as jurors in a case of this sort arises not only from their possible fear of loss of employment, though this is itself a major ground for their disqualification, as pointed out in the *Frazier* case. By an ordinary process of rationalization, persons who must adopt certain attitudes under coercion tend to conceal their submissiveness from themselves by embracing these attitudes as desirable. It was in this way that many Germans who had been decent persons came to adopt and put into practice the most virulent Nazi views. As stated in the *Frazier* dissent, the federal government demands of its employees "unquestioning ideological loyalty." Such loyalty, once yielded for a time, cannot be casually removed because the employee is given a seat in a jury box.

4. *The Issue of the Unfair Trial*

Enough has been said in our statement of the case to demonstrate without further discussion that the trial was unfair in the following respects: (1) The prosecutor repeatedly made inflammatory statements and introduced vast quantities of inflammatory evidence, none of which was necessary to the proof of his case or relevant to the indictment. This circumstance requires reversal despite any admonitions by the trial judge seeking to restrict the jury to the true issues.[9] *Cf. Skuy* v. *United States,* 261 Fed. 316; *Berger* v. *United States,* 295 U. S. 78, 88; *Towbin*

[9] In the first *Eisler* case, we contended that Eisler had received an unfair trial because of the hostile conduct of the trial judge. We make no such contention here. Judge Morris exhibited a judicial attitude throughout the trial, much as we disagree with many of his rulings. The prejudice here was caused by the prosecutor and by the fact that the rulings failed to restrict the prosecution statements and evidence within proper limits.

v. *United States*, 93 F. (2d) 861; *Frisby* v. *United States*, 35 App. D. C. 513, 520.

(2) The presentation of the case by the prosecution and the evidence which was allowed completely obscured the charges of the indictment and must have caused the jury to believe, as apparently did the prosecutor himself, that the petitioner was being tried for being a Comintern agent or, at least, an important Communist. (3) The defense had no fair notice of what it was required to meet, and when surprised without being at fault was not allowed to obtain by deposition contravening evidence.

In the decision of the Court of Appeals affirming the conviction, the majority disposed of the above contentions as follows:

> By requesting particulars concerning his alleged membership in and affiliation with the Communist Party, the appellant invited the widest scrutiny of his Communist activities. He insisted that the sluice gates of government proof be opened and he was overwhelmed by the flood which followed.
>
> In spite of this, the appellant claims prejudicial error because the prosecuting attorney outlined in his opening statement the broad sweep which his proof would take concerning Eisler's activities as a Communist and as an agent of the Communist International.[10] He claims those statements were inflammatory, and strenuously complains of the admission of evidence to the effect that he was an agent of the 'International.' All this amounts to nothing more than saying the proof of guilt was so abundant as to be oppressive and prejudicial,—a novel conception we cannot accept.

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[10] Our claim below, like the claim here, was, of course, much broader than the court here indicates. We claimed that the trial was unfair. The nature of the prosecutor's opening statement was only one of the unfair elements of the trial—though in itself enough to warrant reversal.

This passage is at once curious and revealing. It is curious in its announcement of a novel and illogical doctrine that the requesting of particulars "invites scrutiny" and "opens sluice gates of proof"—particularly when the scrutiny is of irrelevant issues and when the proof which floods through the sluice gates is not only irrelevant but is outside of the particulars which were granted. The passage is revealing in showing that the majority of the appellate court, like the prosecuting attorney, thought that the petitioner was being tried for "his Communist activities" (which were put under "scrutiny"), and that proof that Eisler was a Communist and an agent of the Communist International was the proof of his guilt under the indictment.

If two learned appellate judges and the prosecuting Assistant United States Attorney so misunderstood the case, it is a reasonable assumption that the jury, government employees and all, understood it no better and believed that the real question was whether Eisler was, in the prosecutor's words, "anti government" (*i. e.*, a Communist). Yet, as the dissent below pointed out, "The indictment does not allege that he was a most important and disruptive Communist, but this was urged throughout the trial."

5. *The Issue of Vagueness*

If the questions referred to in the indictment were vague, then the indictment for falsely answering those questions was itself vague and therefore invalid under the due process clause. *Cf. M. Kraus & Bros.* v. *United States,* 327 U. S. 614. What is more, if any one of the questions was vague, the conviction cannot be sustained. All the questions are contained in one count. The trial court refused to instruct the jury that in order to convict it must find that all the questions mentioned were answered falsely (R. 23, 24, requested

instructions 12 and 13). Instead, its charge clearly and expressly required the jury to convict if it unanimously agreed that any one of the questions was answered falsely (R. 757, 772). The general verdict of guilty can, therefore, have rested on the answer to any one of the questions involved.

In the first question, the most obvious ambiguity arises from the word "affiliated." So far as the defense was able to understand the prosecution's exposition of the relevancy of its presentation, it rested on the theory that the charge of "affiliation" permitted the proof offered. The unfettered scope of this proof thus demonstrates the obscurity and elasticity of the "affiliation" concept. The prosecution relied heavily on the definition of "affiliated" in *Bridges* v. *Wixon*, 326 U. S. 135, but that case gives more of a general discussion than a practical definition of this difficult term. The trial court's definition of the term for the jury, which follows the language in the *Bridges* case, is, we submit, conclusive demonstration of the fatal vagueness of the term both to one executing a form and to a jury in a criminal case.[11]

Also vague and undefined are the terms "organizations," "groups," "societies," "clubs," and "associations." Counsel for the government conceded that these words prob-

[11] The trial court's definition was as follows (R. 769):

. . . affiliation of an individual with an organization means less than membership in it, and more than mere association with it. 'The act or acts must evidence a working alliance to bring the program to fruition.' Affiliation of an individual with an organization includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith. The intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the requirement of affiliation.

ably did not include certain political parties, but did include others (R. 468, 469). The trial court believed that the question did not refer to every and any kind of organization (R. 731, 732). But never was there a workable definition, either for one executing the application or for the jury, of what the terms included. Indeed, the jury was left to determine in its own discretion what groups should be listed on the application (R. 768). Finally, the application form, which contained no definitions of its terms, did not indicate whether it required listing of organizations outside of the United States, nor did it set any time limits or standards.

The ambiguity of the question as to "what names you have used or have been known by" is likewise clear. The most the prosecution proved as to "Hans Berger" was that it was a pen name. But is an author, whose identity is unknown, "known by," or does he "use," a pen name? As to "Eisman," Eisler endorsed checks which had been drawn to this name for sentimental reasons. The drawer knew that Eisler was not Eisman and that Eisman was a fictitious payee. Was Eisler then "known by" the name of "Eisman"? Does the question require listing of childhood nicknames? Does "before and after your arrival in the United States" mean immediately before and after or during an entire lifetime?

In the third question, the court interpreted "resided" as meaning nothing more than "been" (R. 768, and see also R. 333, denial of requested instructions 74, 75, 76, 77). Such a broad meaning could not be reasonably ascribed to the term by one executing the form.

6. *The Issue of Relevancy*

As we have noted, none of the information allegedly concealed from the State Department was unknown to it, nor

did this information affect the Department's decision as to whether to allow Eisler to depart.

In addition, under the applicable regulations, Eisler in fact was not required to obtain a permit to depart. He came within each of two classes of aliens who were exempted from obtaining permits to depart under section 58.23 of State Department Regulations No. 8, 10 F. R. 5895-5898 (quoted in Appendix herein).

Section 58.23(c) exempts "aliens who have entered the United States with limited-entry certificates and who are departing from the port through which they entered and within the limits of the period for which they were admitted." Eisler entered with a limited-entry certificate (the transit privilege) and he was departing from the port of New York, where he entered. He had been admitted for 60 days as a person in transit, this period was extended by the government for additional periods of 60 days, and finally, without application by Eisler, the government to suit its own convenience extended the stay indefinitely. Thus Eisler had not overstayed his permitted time.

Section 58.23(f) exempts "aliens ordered deported from the United States." As stipulated, Eisler had been ordered deported on his arrival here in 1941 and had declined to appeal the order of deportation.

We believe that it is an important question in the administration of justice whether 22 U.S.C. sec. 223 punishes the making of immaterial false statements and whether it extends to cases where the application for an exit permit was not required and had no function.

The importance of this question extends, indeed, far beyond the particular statutory section. Together with the questions raised as to the ambiguity of the application form, it involves fundamental issues of the relationship between an individual and the state. Under modern conditions, the execution of federal forms is the commonplace

experience of virtually every adult inhabitant of this country. Oppressive and discriminatory prosecution is easily available, to suit the purposes of prosecuting authorities, to punish "falsification" if there are no adequate standards to protect against obscurity of application phraseology and to require that some genuine hurt to the public interest be shown. Thus in this case, it is obvious that any one other than Gerhart Eisler would not have been stopped from going home because he omitted, in answering a poorly worded, searching questionnaire, information with which the government authorities were fully acquainted and which had no relation to the questionnaire's purpose. If standards of relevancy and precision of language are not applied, then our system permits the abuse of justice which was long ago guarded against by the rule that conviction for perjury requires that the falsification be material and that the proof of the offense be of a particularly high order. *Weiler* v. *United States*, 323 U. S. 606 (cf. R. 25, 26, for trial court's refusal to adopt the perjury rules of evidence).

Conclusion

The writ of certiorari should be granted, and the judgment below should be reversed with the direction that the indictment be dismissed.

Respectfully submitted,

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APPENDIX

Statutes and Regulations

(a) U. S. C. Title 22, Sec. 223:

§ 223. *War-time restrictions generally.*

When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by sections 223-226b of this title be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful. As amended June 21, 1941, c. 210, § 1, 55 Stat. 252.

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

* * * * * * *

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

* * * * * * *

Note: 22 U. S. C. sec. 225 provides the penalty for violation of section 223.

(b) Presidential Proclamation 2523, November 15, 1941; 55 Stat. 1696.

Control of Persons Entering and Leaving the United States
By the President of the United States of America
A Proclamation

* * * * * * *

(2) No alien shall depart from or attempt to depart from the United States unless he is in possession of a valid permit to depart issued by the Secretary of State or by an officer designated by the Secretary of State for such purpose, or unless he is exempted from obtaining a permit, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of the rules, regulations and orders herein prescribed; nor shall any alien depart from or attempt to depart from the United States at any place other than a port of departure designated by the Attorney General or by the Commissioner of Immigration and Naturalization or by an appropriate permit issuing authority designated by the Secretary of State.

No alien shall be permitted to depart from the United States if it appears to the satisfaction of the Secretary of State that such departure would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

* * * * * * *

(c) State Department Departmental Regulation No. 8, 10 Fed. Reg. 5895 to 5898.

§ 58.23. *Aliens exempted from obtaining permits to depart.* Aliens of the following classes shall not be required to obtain permits to depart:

* * * * * * *

(c) Aliens who have entered the United States with limited-entry certificates and who are departing from the port through which they entered and within the limits of the period for which they were admitted: . . .

• • • • • • •

(f) Aliens ordered deported from the United States . . .

• • • • • • •

§ 58.25. *Classes of aliens not entitled to depart.* The departure of an alien who is within one or more of the following categories shall be deemed to be prejudicial to the interests of the United States, for the purposes of §§ 58.21 to 58.32, inclusive:

(a) Any alien who is in possession of, and in whose care (sic) there is evidence that he is likely to disclose to unauthorized persons, information concerning, the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States or any of its Allies;

(b) Any alien departing from the United States for the purpose of engaging in, or who is likely to engage in activities designed or likely to obstruct, impede, retard, delay, or counteract the effectiveness of the national defense of the United States or the measures adopted by the United States in the public interest or for the defense of any other country;

(c) Any alien departing from the United States for the purpose of engaging in, or who is likely to engage in, activities which would obstruct, impede, retard, delay, or counteract the effectiveness of any plans made or steps taken by any country cooperating with the United States in the prosecution of the war;

(d) Any alien departing from the United States for any country for the purpose of organizing or directing, in or from such country, any rebellion, insurrection or violent uprising in or against the United States, or of waging war against the United States, or of destroying

sources of supplies or material vital to the national defense of the United States or to the effectiveness of the measures adopted by the United States for the defense of any other country;

(e) Any alien who is a fugitive from justice on account of an offense punishable in the United States;

(f) Any alien whose presence in the United States is needed as a witness in, or as a party to, any criminal case pending in a court or which is under official investigation: *Provided,* That any alien who is a witness in, or party to, a criminal-court proceeding may be permitted to depart with the consent of the appropriate prosecuting authority, unless such alien is otherwise prohibited from departing under §§ 58.21 to 58.32, inclusive;

(g) Any alien who is registered, who is subject to registration, for training or service in the armed forces of the United States and who shall not have obtained the consent of his local draft board or an appropriate officer of the Selective Service System to depart from the United States.

• • • • • • •

§ 58.30. *Departure permitted in special cases.* (a) Notwithstanding the provisions of §§ 58.21 to 58.32, inclusive, the Secretary of State may in his discretion authorize the issuance of a permit to depart to any alien, or may allow any alien to depart without such permit if he deems such action to be in the interests of the United States: . . .

§ 58.31. *Applications for permits to depart.* Any alien in whose case a permit to depart is required, desiring to depart from the United States, shall apply to the Secretary of State, or to such officer as may be designated, for a permit to depart from the United States as follows:

(a) Blank application forms for permits to depart may be obtained from the Visa Division, Department

of State, Washington, D. C., or from an office of the Immigration and Naturalization Service, or from a permit-issuing authority in the outlying possessions of the United States. Applications should be mailed at least 30 days before the date of intended departure in order that any delay in departure may be avoided: . . .

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 845

GERHART EISLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM SUGGESTING DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI

The Solicitor General submits this memorandum in order to suggest the propriety of denying the petition in this case because of the petitioner's flight from justice.

On May 6, 1949, after the Court of Appeals had affirmed his conviction and before the filing of the instant petition, the petitioner fled the United States. Efforts to secure his extradition from Great Britain were unsuccessful, and he is now in the Soviet Zone of Occupied Germany. (Pet. 20.) The petitioner has given no indication, in his petition or otherwise, that he intends voluntarily to return to the jurisdiction of the United States.

Review on writ of certiorari is not a matter of right, but of sound judicial discretion. Revised Rules of the Supreme Court of the United States, Rule 38 (5). An individual who has deliberately placed himself beyond the jurisdiction of this Court should not be heard to invoke its discretion to review his conviction. In *Smith* v. *United States,* 94 U. S. 97, Chief Justice Waite, speaking for a unanimous Court, said:

> It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case.

These observations are as applicable to the circumstances now before the Court as to the case in which they were uttered. Compare also *Bonahan* v. *Nebraska,* 125 U. S. 692; *Allen* v. *Georgia,* 166 U. S. 138; *People* v. *Genet,* 59 N. Y. 80; *State* v. *Spry,* 126 W. Va. 783. See American Law

Institute, Code of Criminal Procedure, Official Draft (1939) § 442 and Commentary, p. 1236.

The Government therefore submits that the petition should be denied because the petitioner has fled the jurisdiction of the Court. If, however, the Court should believe that these circumstances are not in themselves a sufficient reason for denying the writ, the Government requests additional time, after action on this suggestion, within which to present its other reasons for opposing the grant of a writ of certiorari in this case.

Respectfully submitted.

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Solicitor General.

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